89-1025

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

DENNIS ENGLAND, STANLEY NIELSEN,
MARLENE ENGLAND and JAN NIELSEN,
Petitioners,

v.

RICHARD HENDRICKS and FERRIS GROLL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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December 22, 1989

QUESTIONS PRESENTED

1. Does the doctrine that qualified immunity bars standing trial and is waived by going to trial, preclude the Circuit Court of Appeals from overturning a civil rights jury verdict against the defendants?

2. Does the Seventh Amendment bar to re-examination of jury verdicts preclude the Circuit Court of Appeals from overturning a jury verdict, based on a "de novo" review of the evidence?

3. Does clearly established Utah statutory and case law conflict with the holding that there is no statutory or law in Utah giving guidance as to whether aiding and abetting could have been used to charge an absentee store owner?

4. Does the combined effect of the above three anti-precedent holdings of the Tenth Circuit emasculate the civil rights

vindication objectives of Sec. 1983 and 1988?

[Note: Petitioners reserve the right to argue Question 5 in the event certiorari is granted on the above questions, but does not include Question 5 among the reasons for the grant of certorari.]

5. Did the circuit court abuse its discretion in vacating the district court's award of Sec. 1988 attorney's fees and did the district court err in dismissing the partner-wives for lack of standing, and in denial of an exemplary damage instruction?

LIST OF PARTIES

The parties to the proceedings below were petitioners Dennis England, Stanley Nielsen, and wives and partners Marlene England and Jan Nielsen, and respondents, policeman Richard Hendricks and chief Ferris Groll. The County Attorney Gunnell was a separate appellee who had been dismissed out by the District Court on the grounds of absolute prosecutorial immunity. The Circuit Court held that the prosecutor's press release claim was "administrative" and remanded that issue for further proceedings. Since the issue is not addressed in this petition the County Attorney is not named as a party herein.

The respondents before this Court include Richard Hendricks and Ferris Groll.

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The petitioners Dennis England, Stanley Nielsen, Marlene England and Jan Nielsen respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals, entered in the above entitled proceedings on July 21, 1989 with a petition for re-hearing en banc denied September 28, 1989.

OPINIONS BELOW

The second and final opinion of the Court of Appeals for the Tenth Circuit is reported at 880 F2d 281, and is reprinted in the Appendix hereto, p. 2.1 infra. The first opinion of the Court of Appeals for the Tenth Circuit was withdrawn from publication and is reprinted in the appendix hereto p. 3.1 infra. The order denying petition for rehearing en banc is re-printed in the Appendix hereto, p. 4.1 infra. The District Court proceedings are not reported. The judgment on jury verdict of the United States District Court for District of Utah is reprinted in Appendix hereto, p. 5.1 infra and its order denying defendants' Motion for Summary Judgment is reprinted in Appendix hereto, p. 6.1 infra.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. Sec. 1983, the petitioners brought this suit in the District of Utah. The Court denied respondents' motion for summary judgment on immunity on September 28, 1986 which was not appealed (p. 6.1 infra). A jury verdict against respondents was entered on November 4, 1986 and a judgment on the jury verdict was entered on November 2, 1986 from which respondents appealed. See p. 5.1 infra.

On respondents' appeals, the Tenth Circuit on June 12, 1989 entered its first judgment and opinion overturning the jury verdict and reversing the Utah District's Summary Judgment Denial Order (p. 3.1 infra). The first opinion was vacated on June 14, 1989 (p. 3.17 infra). The Tenth Circuit's second judgment and opinion was entered on July 21, 1989 (p. 4.1 infra).

Petition for rehearing en banc was denied on September 28, 1989 (p. 4.1 infra).

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. Sec. 1254 (1).

CONSTITUTIONAL AMENDMENT INVOLVED

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, **and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.**

STATEMENT OF THE CASE

In 1983 the petitioners were co-owners of a video rental store in Logan, Utah at the time respondents, Logan City police officer Hendricks and his chief Groll, signed (and authorized) second degree felony informations against the husband petitioners charging them jointly with two felony counts of knowingly **distributing** "harmful," (R-rated) videos to a minor and failing to exercise

reasonable care to ascertain the minor's age. The result of the press releases and publicity was that petitioners were locally and nationally falsely branded as "alleged porno dealers" in a publicity blitz though the subject videos were not X-rated "pornographic" and were never alleged to be. In fact and by allegation and proof, the tapes were always classified as "harmful to minors" (R-rated) and not "pornographic" "X"-rated. It was never alleged that the videos were (X-rated) pornographic as the Tenth Circuit opinion (and headnotes) erroneously found (p. 2.3 infra). At state court preliminary hearing the charges were dismissed for lack of probable cause to believe that England or Nielsen had distributed (rented) the "R"-rated tapes as alleged. A male clerk whose handwriting was on the rental

entries confessed to the distribution claiming the minor looked much older.

In 1985 petitioners instituted this civil rights damage action pursuant to 42 U.S.C. Sec. 1983. The complaint alleged that respondents acted in bad faith, malice and perjury in filing the information without probable cause for identification. Petitioners also alleged that respondents knew England was not in the county and knew nothing of the "distribution" and that respondents had no evidence that either petitioner participated in the alleged felonious tape distribution to a minor. They alleged details of both malice and perjury on the part of respondents.

Respondents' answer demanded trial by jury and asserted qualified immunity as their principal "defense." Petitioners partner-wives were dismissed out for lack of standing. The prosecutor Gunnell was

dismissed out on the grounds of prosecutorial immunity.

After discovery, respondents moved for summary judgment that they had qualified immunity. On September 28, 1986, after opposition, reply and oral hearing the District Judge entered an order denying respondents motion for summary judgment on immunity (p. 6.1 infra).

Respondents never appealed from the summary judgment order denying immunity, but proceeded to trial before the jury they had demanded.

The five day jury trial was filled with windfalls for the plaintiffs. There was a flood of incriminating admissions by Chief Groll, Officer Hendricks and prosecutor Gunnell. Defendants called the state director of police officer standards and training who had not heard their

admissions. He proved that their admitted acts and practices grossly violated the training standards. There was powerful evidence that the facial appearance of probable cause on the information was supplied by grossly perjured statements of Hendricks (condoned by Groll), and the jury so found. Chief Groll openly and defiantly claimed the right to apply vicarious felony liability theories to the non-resident shop owners, but not to the other resident or corporate owners whose clerks were caught in the same operation. (See Reason III Arguments infra.) At trial they used the pretext of aiding and abetting, but never charged its elements. Respondents charged direct distribution by petitioners.

There was powerful evidence of a specific malice against petitioners arising from earlier conferences and admissions by Groll that there was a

publicity campaign motive. The evidence showed the publicity was so successful that it permanently ruined the husbands' and wives' video business in the conservative community. In short, the trial yielded surprise admissions and other conclusive and substantial evidence of a local police state as constitutionally corrupt and discriminatory in its own way as those local enforcement systems that gave rise to the civil rights act. District Judge Winder used the ruling on motions for directed verdicts to instruct Chief Groll on the specific areas of his unconstitutional police practices and training his officers. Winder tried to get Groll to agree to stop. In a three round exchange, Groll defiantly refused to accept Judge Winder's instructions on basic law of probable cause evidence and

prohibited vicarious felony liability (Tr. p. 540-544 and Reason III infra).

To the prejudice of only petitioners, the judge submitted the waived immunity issue to the jury. Nevertheless, the jury (demanded by respondents) returned a verdict for the husband petitioners for $25,000 damages each against the respondents jointly and severally. Judgment was entered on the verdict November 20, 1986 and attorney's fees were awarded (p. 5.1 infra). Respondents never moved for a new trial and appealed the jury verdict judgment on the basic grounds that they were immune as a matter of law, even though they had clearly waived immunity under Mitchell v. Forsyth, 472 U.S. 511 (1985).

The Tenth Circuit Court rendered its first "published" judgment and opinion on June 12, 1989 (p. 3.1 infra) and withdrew and vacated it on June 14, 1981 (p. 3.17

infra). The first part of the withdrawn opinion overturned the jury verdict by effectively nullifying the doctrine that qualified immunity is from standing trial, and is waived by going to trial and; by vitiating the Seventh Amendment protection of jury verdicts on federal appeals by applying an erroneous de novo standard of review to verdict appeals and by accepting a theory of vicarious criminal liability as objective good faith (p. 3.7 - 3.13 infra). The second part of the withdrawn opinion avoided the prosecutor immunity issue by materially altering the wording of Rule 54(b) of the Federal Rules of Civil Procedure (3.13 - 3.15 infra).

The Tenth Circuit's second and final decision of July 21, 1989 is reported at 880 F.2d 281. (See also p. 2.1 - 2.19 infra.) They corrected the second part of the withdrawn opinion's glaring misquote

and misapplication of Rule 54(b) F.R.C.P. and properly relegated the prosecutor's press releases from absolute to qualified immunity status (p. 2.12 - 2.18 infra). Though the error in the first part of the withdrawn decision overturning the jury verdict was perhaps even more glaring than the Rule 54(b) misquote they maintained the same part I wording in overturning the jury verdict.

They erroneously applied rules to the appeal as though it was an appeal from a denial of summary judgment on immunity, though they acknowledge it was in fact an appeal after trial from an adverse jury verdict. The final opinion patently conflicts with both the doctrine of Mitchell that immunity is from trial, and the Seventh Amendment protection of jury verdicts:

> **Hendricks and Groll contended in a motion for summary judgment that they were entitled to**

qualified immunity, but the court rejected their argument. Instead the case proceeded to trial and the trial court also rejected the qualified immunity argument in a timely motion for directed verdict. The judge sent the question of qualified immunity to the jury, and **the jury returned with a verdict in favor of England and Nielsen.** The court subsequently awarded plaintiffs their attorney's fees pursuant to 42 U.S.C. Sec. 1988.

In these consolidated appeals, **Hendricks and Groll appeal the court's denial of their motions for summary judgment and for directed verdict on the grounds that they were entitled to qualified immunity.** England and Nielsen appeal the court's dismissal of Gunnell as a party defendant. Finally, Hendricks and Groll appeal the award of attorney's fees. (p. 2.5 - 2.7 infra)

This statement that the case proceeded to a jury trial verdict mandates appellate confirmation of the verdict under both the trial immunity waiver doctrine in Mitchell v. Forsyth, 472 U.S. 511 (1985) and the Seventh Amendment bar to overturning jury verdicts except in the complete "absence of probative facts" under Parsons v.

Bedford et. al. 3 Pet. 433 (1830) and its progeny of cases including Denver and Rio Grande Western Railroad Company v. Conley, 293 F2d 612 (10 Cir. 1961). The fact that the conservative judge again submitted the Mitchell waived immunity issue to the jury could have only prejudiced plaintiffs, not defendants.

Notwithstanding these clear legal conclusions flowing from the jury verdict the Circuit Court ignored the effect of the jury trial and fabricated its whole verdict reversing rationale on the erroneous anti-Seventh Amendment "de novo" standard of review, extrapolated from a Sec. 1983 Tenth Circuit case in 1988 where there had been a proper Mitchell style immunity summary judgment appeal but no immunity waiving trial or jury verdict. That Eastwood v. Department of Corrections of Okla., 846 F.2d 627, 629 (10th Cir.

1988) case standard of review is directly inapposite to and in direct conflict with this decision on a broad range of issues including the erroneous "de novo" review standard on jury verdict appeals. This decision's flawed conclusion is:

> "The issue of whether Hendricks and Groll were entitled to qualified immunity is a question of law. **Thus, our standard of review on appeal is de novo.** Eastwood v. Department of Corrections of Okla., 846 F.2d 627, 629 (10th Cir. 1988)."

Eastwood also strongly and directly counters the Tenth Circuit conclusions here on the good-faith bad-faith distinction and what the Utah law clearly prescribes in terms of vicarious liability.

These errors and misapplications of the "de novo" standard (and others) were so glaring and extreme on the face of the opinion that the syllabus author simply omitted the trial jury verdict and final

judgment appeal facts from his syllabus by expressly misstating that the appeal was taken directly from the summary judgment immunity denial in England v. Hendricks, 880 F2d 281:

> "The United States District Court for the District of Utah, David R. Winder, J., **entered summary judgment in favor of prosecutor and denied summary judgment on motion by police chief and police officer. (XXX) Appeal and cross appeal were taken**. The Court of Appeals, Saffels, District Judge, sitting by designation, held that: (1) police chief and police officer were entitled to qualified - immunity; (2) prosecutor was entitled to absolute immunity for initiation of prosecution; and (3) prosecutor would only be entitled to qualified immunity for alleged statements to press.
> Affirmed in part, reversed in part, and remanded." (Emphasis added)

The critical jury trial, verdict, final judgment and appeal therefrom are omitted. The truth that there was a five day jury trial, verdict, final judgment and appeal therefrom would appear to have

left the syllabus author with no place to fit the convoluted decision's syllabus and headnotes within the logical framework of reported jurisprudence.

The petition for re-hearing (en banc) was denied on September 28, 1989.

REASONS FOR GRANTING THE WRIT

I.

The Tenth Circuit's "immunity defense is reviewable after trial" doctrine directly conflicts with the "immunity is waived by going to trial" and bars standing trial doctrine established in decisions of this Court, other Circuits and prior Tenth Circuit decisions.

Acting without congressional authority, the Tenth Circuit has fabricated a new species of qualified immunity in direct conflict with the doctrine that immunity is a bar to trial waived by going to trial, declaring immunity to be an affirmative defense at trial in which appellate review is permitted after standing trial. Such a

drastic re-ordering of the nature and procedural effect of qualified immunity deserves this court's attention.

The police defendants went to trial in this case without any appeal from the District Judge's denial of their motion for summary judgment on immunity and appealed from a trial jury verdict based judgment against them. The Tenth Circuit reviewed the immunity evidence "de novo," overturned the verdict and reversed the summary judgment denial.

The Tenth Circuit's creation of qualified immunity as an affirmative defense at trial, reviewable "de novo" on appeal after trial, conflicts with this Court's holding in Mitchell v. Forsyth, 472 U.S. 511 (1985).

The core holding in Mitchell by Justice White is that "qualified immunity" is an immunity from suit rather than a

mere defense to liability; and like absolute immunity is lost if a case is erroneously permitted to go to trial" (472 U.S.of 526; "the district court's decision is effectively unreviewable on appeal from a final judgment" "the court's denial of summary judgment finally and conclusively determines the defendant's claim of right not to stand trial on the plaintiff's allegations." (472 U.S. 527).

The Tenth Circuit opinion is in direct conflict with each of the cited points of Mitchell's holding. The Tenth Circuit expressly and inherently holds that immunity is a defense to liability at trial; Mitchell held that immunity is not a mere defense to liability, but is rather a right not go go to trial. Mitchell ruled that immunity was waived by going to trial; England ruled that that immunity is not waived by going to trial. Mitchell ruled that the summary judgment denying

immunity finally and conclusively denied immunity; England held immunity is reviewable "de novo" on appeal after final judgment.

This new Tenth Circuit immunity doctrine has the appearance of judicial insubordination to this Court's Mitchell doctrine on the fundamental nature and effect of immunity, which if not corrected by granting this petition will quite certainly create chaos in most civil rights proceedings. An equally critical reason for granting the petition is that the reported decision has and will be read by the law enforcement community as a message that the Tenth Circuit will judicially both misconstrue conclusive facts and alter clearly established law to support clearly unconstitutional local police actions.

II.

The Tenth Circuit's "de novo" weighing of evidence on immunity on appeal from a jury verdict judgment for plaintiffs, conflicts with the Seventh Amendment, decisions of this Court, other Circuits and prior Tenth Circuit decisions.

This manufactured Tenth Circuit's doctrine fixing a "de novo" review standard on appeals from jury verdicts directly conflicts with the Seventh Amendment's appellate review limitation to "absence of probative facts" under Parsons, infra and its progeny. Such a fundamental and confounding departure from clear long established Supreme Court doctrine applying the Seventh Amendment protection of jury verdicts, merit this Court's consideration.

It was not petitioners, but rather the respondent, police officers who invoked their Seventh Amendment right to a jury trial in this case. The case was

tried before respondents' demanded jury who returned a verdict against them. The officers appealed from the judgment entered on the verdict. The Court of Appeals by applying a "de novo" standard of review overturned the verdict. The Tenth Circuit even stretched the "de novo" review standard beyond by its erroneous inflammatory key finding that the subject videos were "**allegedly pornographic**" or "X"-rated (p. 2.3 infra). There was not one scintilla of evidence in the record to support this wholly spurious inflamatory and libelous appellate finding of **alleged pornography**. There was no conflict in the conclusive evidence with respect to the allegations of the nature of the videos at any stage. Hendricks and Groll always consistently alleged and charged that the subject videos were ("R" rated) "harmful to minors", not "X" rated pornographic as

the Court of Appeals found without any supporting evidence.

It is difficult to imagine a more aggravated case of violation of both the letter and spirit of the Seventh Amendment. Here the Tenth Circuit has fabricated on appeal a spurious factual finding that petitioners were alleged to be dealing in "pornographic" video tapes. This was directly contrary to all the evidence placed before the jury. That totally false and inflammatory finding of "allegedly pornographic video dealing by petitioners fabrication is now published and reported as fact because the Tenth Circuit assumed appellate powers expressly denied it by the Seventh Amendment. This application of the Seventh Amendment is confirmed and established by Parsons v. Bedford, et. al. 3 Pet. 433 (1830) and its progeny of cases including the Tenth Circuit's own case of Denver and Rio

Grande Western Railroad Company v. Conley, 293 F.2d 612 (10 Cir. 1961).

This obvious collision between this Seventh Amendment precedent and this Tenth Circuit decision must have been another major reason why the syllabus author misrepresented the proceedings below by denying the jury trial in order to fit the case into a rational law reporting system (See pgs. 16, 17 supra.)

If not corrected by granting this petition this Anti-Seventh Amendment Tenth Circuit doctrine will continue to foster disregard in the federal judiciary of Seventh Amendment principles and precedents protecting jury verdicts particularly within the Tenth Circuit and create confusion in other circuits. Also, unless this petition is granted this reported Tenth Circuit case will perpetuate without mitigation a gross

inflammatory and totally baseless judicial libeling of petitioners by the Tenth Circuit Court by the false finding that they were dealing in "allegedly pornographic" videos. There appears here an additional, extraordinary reason for granting this writ. It is an opportunity for this Court to restore integrity to the face of the federal reporter system compromised here by the gross conflict between the syllabus denial of the jury trial and the decisions statement of facts that there was indeed a jury trial and verdict. (See pgs. 16, 17 supra.)

III.

The holding that there is no clearly established Utah law prohibiting felony charges against a non-participating absentee store owner because of the Utah aiding and abetting statute, conflicts with Utah law, decisions of this Court and other Circuits, all clearly proscribing vicarious felony liability.

The Tenth Circuit holds here that there is no Utah case (or statutory) law giving any guidance to the prosecutor or officers proscribing charges against a store owner who they knew was out of the County on the day the "R"-rated videos were distributed to a minor, even though it was conceeded there was no evidence of any form of participation in the alleged felonious distribution and the charges were direct distribution, not aiding or abetting. This Tenth Circuit resurrection of unmitigated police state style vicarious felony liability raised to the level of objective good faith protected by qualified immunity merits the granting of this petition.

A major part of the evidence supporting claims of malice was that petitioner England was first singly charged with the direct distribution of the videos. When he appeared to officers

Hendricks and Groll on the first direct distribution charge they acknowledge he had been 40 miles away at home in another county on the day of the offense, but they were so determined to get him that they not only recharged him with direct distribution, but also added his male partner Nielsen as having also directly distributed the two tapes to the minor. The County Attorney, Gunnell, approved this amended information and all three independently justified it on the pretext of the aiding and abetting statute though they always charged direct distribution; never charged the elements of aiding and abetting and admitted they had no evidence of absent England's participation. District Judge Winder correctly set forth the conclusiveness of the clarity of the Utah Law as applied to the conceded facts

before the jury in his rulings on motions for directed verdicts as follows:

> The Court:.."I have thought about directing a verdict at least against Chief Groll because Chief Groll, like the county attorney here, testified that he thought then and still thinks that an owner can be charged under this statute simply because he's an owner, in which it is incredible to me, but that is not the law. Most emphatically, as I have already discussed, there just isn't any doubt about that."...
>
> "Mr. Groll in his testimony didn't seem to rely on the county attorney. He apparently hasn't even learned from these proceedings, and you don't charge people with felonies based on vicarious liability, Chief Groll. I mean, people to be violating the criminal laws have got to themselves personally with intent be involved in the elements of the crime. Do you understand that now?" (Tr. pgs. 540-541)
>
> The Court: "What I'm saying, Chief Groll, is your view of the law is wrong and the criminal law before you charge people with felonies, that person has got to either do the crime themselves or they have got to pay another."... (Tr. pg. 542.)
>
> **"And the most important thing in any criminal statute is that there be a union of act and intent.** And what you forgot about totally in this case is the

requirement of intent. And there has got to be intent on the part of these people to be charged with the felony.

And the same is true with the county attorney. You don't charge people in Utah with felonies if they didn't participate knowingly in the commission of the crime. And they certainly don't need to do it themselves, but need to know what somebody else is doing, and that needs to be done at the solicitation or encouragement. And there simply isn't a shred of evidence in this case that Mr. England knew anything about what was happening at the time that this was done, and that's why I have said what I have during the trial. (Tr. pg. 543.)

The Court: "Stand up and let me talk with you just a minute more, Chief Groll.

As far as what occurred back there, anybody can make a mistake, but the reasons that I made the comments I did to get in here, it seems to me with all due respect, that you would learn something from this suit about the criminal law. And the reason I said what I did is I heard you on the stand yesterday and you said that you still believe that an owner can be charged with the felony because they are an owner. And that is simply wrong.

And in your capacity as Chief of Police, and if you believe that you can charge people with felonies when they didn't involve

themselves personally in the incident, that is what concerned me. (Tr. pg. 544.)

Judge Winder was clearly and unquestionably correct about the clarity of both statutory and case law in Utah proscribing Chief Groll's vicarious liability policy and the Tenth Circuit was dead and dangerously wrong (p. 2.9 - 2.11 infra).

The subject Utah Code Sec. 76-10-1206 U.C.A. 1953 expressly requires that one "knowingly distributes" to a minor. The aiding and abetting U.C.A. 1953 Sec. 76-2-202 expressly requires knowing participation in the distribution to a minor. The Utah case of State v. Comish, 560 P2d 1134 gives explicit aiding and abetting "guidance." International" participation in every offense element is required by Sec. 76-2-101 and is detailed in State v. Blue, 53 P. 978, State v. Allen, 189 P. 84; State v. Stenback, 2

P.2d 1050 and State v. Leek, 39 P.2d 1091; to name a few Utah cases in point.

Vicarious felony liability is expressly proscribed by Sec. 76-2-102 U.C.A. 1953.

The Tenth Circuit's "de novo" second guessing of a federal jury verdict by giving objective good faith status to police-prosecutorial theory of unadulterated vicarius felony liability makes a mockery of civil rights and pushes law enforcement through the already open door to implementation of local totalitarian police states with Circuit Court sanction. This extreme departure of the Tenth Circuit from what is arguably the most fundamental civil right is an almost compelling reason for granting this petition.

IV.

The combined effect of treating immunity as a defense at trial, repudiating Seventh Amendment protections of civil rights jury verdicts and giving good faith status to vicarious felony liability theories emasculates Sec. 1983 objectives and chill-freezes advocacy under Sec. 1988.

The net effect of these three anti-precedent Tenth Circuit doctrines of immunity as a defense, de novo verdict review and good faith theories of vicarious felony liability is to introduce a gigantic new and spurious risk element beyond a successful verdict into prosecuting almost all civil rights cases, thus judicially nullifying the congressional civil rights vindication objectives of Sec. 1983 and Sec. 1988. In short, these doctrines give the circuit courts the power to suppress constitutional rights in the same way Sec. 1983 was intended to prevent certain state court judicial decisions from suppressing

constitutional rights. This doctrinal assumption by the Tenth Circuit of appellate judicial power to frustrate the clear congressional objectives of the civil rights act and your related precedent deserves this court's attention.

This is an unusual case where petitioners overcame incredible odds in the successful vindication of civil rights by obtaining the required 12 person jury verdict from a jury demanded by the respondents. Petitioners should not have been required to convince the jury after the waiver that there was no qualified immunity, but the judge was overly protective of the officials and gave detailed immunity instructions, potentially prejudicial only to petitioners. The jury still returned a verdict for petitioners. The judge made a $30,280.00 Sec. 1988 fee award to

respondents counsel. The Tenth Circuit's overturning the verdict on appeal on the absurd pretext that "de novo" review standard applies that immunity is a trial defense; and that vicarious felony liability is good faith gives a strong anti-civil rights enforcement message. The decision effectively holds that after a proper Federal District Court's civil rights jury verdicts for plaintiffs, the Tenth Circuit still has discretionary power to vitiate those proceedings on the basis of post-verdict "de novo" review of (albiet waived) immunity. This is an excellent example on the federal level of the very kind of anti-civil rights state judicial discretionary intervention protecting local police states which was a primary congressional target under the Civil Rights Act. See Pulliam v. Allen, 466 U.S. 522.

Though each of the previous three reasons stated for granting this petition independently provide sufficient merit, when considered in combination they appear to mandate this court's urgent consideration in order to correct the Tenth Circuit's excission of the three essential teeth of the civil rights vindication under Sec. 1983 and Sec. 1988, Title 42 U.S.C.

CONCLUSION

For these various reasons, this petition for certiorari should be granted Petitioners reiterate that Question 5 is presented herein, not as a reason for granting certorari, but because, given the case status, this is the only opportunity for petitioners to seek review of the ultimate adverse rulings of the Tenth Circuit and their inherent effects. If petitioners are correct, the jury verdict and 1988 fee award should be confirmed and

include appeal; there should be a ruling that the wife-partners were proper parties with a remand to the District Court for, appropriate disposition consistent with this petition including the right to punitive damage instructions after credit for the verdict on general damages.

Respectfully submitted,
DAVID RAINEY DAINES
1158 North 1750 East
Logan, Utah 84321
Counsel for Petitioners

December 22, 1989

P U B L I S H

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

DENNIS ENGLAND, and STANLEY NIELSEN, individually and d/b/a VIDEO AMERICA, Logan Utah, and their wives MARLENE ENGLAND and JAN NIELSEN, and VIDEO USA, INC., a Utah corporation,	)	NOS. 86-2905 87-1720
Plaintiffs-Appellees,	)	
v.	)	
RICHARD HENDRICKS and FERRIS GROLL,	)	
Defendants-Appellants.	)	
DENNIS ENGLAND, and STANLEY NIELSEN, individually and d/b/a VIDEO AMERICA, Logan Utah,	)	
Plaintiffs-Appellees,	)	NO. 87-1069
v.	)	
FRANKLIN LANNY GUNNELL, RICHARD HENDRICKS and FERRIS GROLL,	)	
Defendants-Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(D.C. No. 85-NC-0066W)

David R. Daines, Logan, Utah, for Plaintiffs-Appellees-Cross-Appellants.

Denton M. Hatch (Wesley M. Lang with him on the brief) of Christensen, Jensen & Powell, P.C., Salt Lake City, Utah, for Defendants-Appellants-Cross-Appellees Hendricks and Groll.

Jody K. Burnette, of Snow, Christensen & Martineau, Salt Lake City, Utah, for Defendant-Appellee Gunnell.

Before TACHA, Circuit Judge, SETH, Senior Circuit Judge, and SAFFELS, District Judge*.

SAFFELS, District Judge

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*Honorable Dale E. Saffels, United States District Judge for the District of Kansas, sitting by designation.

(FILED)
United States Court of Appeals
Tenth Circuit

JUL 21 1989

ROBERT L. HOECKER
Clerk

After a videotape rental store in Logan City, Utah rented an allegedly pornographic tape to a minor, the Logan City police began an investigation of the store's owners, Stan Nielsen ("Nielsen") and Dennis England ("England"). Utah Code Sec 76-10-1206 made it a criminal offense to distribute harmful materials to minors. The county attorney, Franklin Lanny Gunnell ("Gunnell") and Officer Richard Wright ("Wright") of the Logan City Police Department met with England and Nielsen regarding the tape rental and advised Nielsen of their duty to comply with Utah Code Sec 76-10-1206. The Logan City police continued monitoring the video rental store, and on April 23, 1983, two minors, acting as police informants, rented allegedly pornographic tapes from an employee of the store. The parties appear to dispute whether the investigating officer on April 23, Officer

Richard Hendricks ("Hendricks"), witnessed the transactions. It does appear, though, that based on information given by Hendricks on April 25, the county attorney prepared an Information charging England with a violation of Utah Code Sec. 76-10-1206.

Hendricks called England to the police station where he planned to serve England with a summons. When England arrived at the police station, Hendricks determined that he was not the person who had actually rented the movies to the informant. Because of this mistake, Hendricks went to talk to the county attorney, Gunnell, before he served England with the summons. Hendricks told Gunnell that England had been misidentified. Gunnell determined that both owners could be charged as aiders and abettors, pursuant to Utah Code Sec. 76-10-1201(4). Gunnell prepared an amended

Information and both England and Nielsen were served with a summons. At the preliminary hearing in the case, the judge dismissed the charges, determining that the two had not been charged properly under Utah's aiding and abetting statute.

England and Nielsen filed suit against Hendricks, Gunnell and Ferris Gross, Logan City Chief of Police. They brought the suit pursuant to 42 U.S.C. Sec 1983, contending that defendants violated their constitutional rights to due process and equal protection by improperly charging them with aiding and abetting the distribution of harmful materials to minors.

The court granted summary judgment in favor of Gunnell on the grounds that he was absolutely immune from liability for his actions taken in his capacity as prosecuting attorney. Hendricks and Groll

contended in a motion for summary judgment that they were entitled to qualified immunity, but the court rejected their argument. Instead, the case proceeded to trial and the trial court also rejected the qualified immunity argument in a timely motion for directed verdict. The judge sent the question of qualified immunity to the jury, and the jury returned with a verdict in favor of England and Nielsen. The court subsequently awarded plaintiffs their attorney's fees pursuant to 42 U.S.C. Sec. 1988.

In these consolidated appeals, Hendricks and Groll appeal the court's denial of their motions for summary judgment and for directed verdict on the grounds that they were entitled to qualified immunity. England and Nielsen appeal the court's dismissal of Gunnell as

a party defendant. Finally, Hendricks and Groll appeal the award of attorney's fees.

I.

The issue of whether Hendricks and Groll were entitled to qualified immunity is a question of law. Thus, our standard of review on appeal is de novo. Eastwood v. Department of Corrections of Okla., 846 F.2d 627, 629 (10th Cir. 1988).

A government official may plead the affirmative defense of qualified immunity in an action brought pursuant to 42 U.S.C. Sec. 1983. Gomez v. Toledo, 446 U.S. 635, 640 (1980). The affirmative defense of qualified immunity is available to all government officials, including police officers. Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 3038 (1987). The government official will be immune from liability if the conduct alleged in the complaint did not violate "clearly

established, statutory or constitutional rights of which a reasonable person would have know." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The Supreme Court in Harlow rejected the former subjective inquiry into the governmental official's motives, as previously set out in Wood v. Strickland, 420 U.S. 308, 322 (1975). Harlow, 457 U.S. at 815. Under the rule announced in Harlow, the courts are now limited to inquiring into the objective reasonableness of the official's actions. Id. at 816. The question of whether the official acted in an objectively reasonable manner is one to be resolved by the court. Mitchell v. Forsyth, 472 U.S. 511, 528 (1985). The court is to determine what the current applicable law is and whether that law was clearly established at the time the official's action occurred. Harlow, 457 U.S. at 818.

On the facts before us, then, Hendricks and Groll would be entitled to qualified immunity if it was not clearly established under Utah law at the time of their actions that a store owner could not be charged under the aiding and abetting statute for distributing materials harmful to minors. Utah Code Sec. 76-10-1206 provides that:

> A person is guilty of dealing in harmful material when, knowing that a person is a minor or having filed to exercise reasonable care in ascertaining the proper age of a minor he: (a) knowingly distributors or offers to distribute, exhibits or offers to exhibit any harmful materials to a minor.

At the time of the officer's actions, there were no relevant Utah Supreme Court cases interpreting this statute. Utah Code 76-2-202 provides that a person may be convicted as an aider and abettor if that person acts "with the mental state required for the commission of an offense"

and "solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense." After Hendricks consulted with Gunnell, Gunnell determined that at least under his interpretation, they could prosecute the owners of a video store under the Utah aiding and abetting statute for distributing harmful material to minors, even if they were not sure whether the owners were the persons who had actually rented the tapes to the minors.

The court need not decide whether Utah law allows a video store owner to be charged as an aider and abettor for violating Utah Code Sec. 76-10-1206. There is no case law in Utah which would have given the county attorney or the officers any guidance as to whether the aiding and abetting statute could have

been used in this instance. Nor is it readily apparent from the statutory language that section 76-2-202 could not have been used here; in fact, a reasonable argument could be made that the section could have been used. Since the decision to charge did not violate clearly established law at the time of the officers' actions, they are immune from suit. Further, in an instance such as the one presented, where the law is unclear, a police officer is immune if the officer consulted with and relied upon the advice of a county attorney. Lavicky v. Burnett, 758 F.2d 468, 476 (10th Cir. 1985). Thus, the officers were entitled to qualified immunity, and the district court's decision to deny Hendricks and Groll's motions for summary judgment and for directed verdict and to send the issue to

the jury was in error.1* This case will be remanded with directions to enter judgment in favor of defendants Hendricks and Groll.

II.

England and Nielsen filed a cross-appeal contending that the court's order granting Gunnell summary judgment on the grounds he was entitled to absolute prosecutorial immunity was in error. The order of summary judgment was entered on September 26, 1985. Judgment on that order was entered on the same day. The cross-appellants did not file their notice of appeal, however, until January 5, 1987, after the trial on the remaining claims was completed. This panel subsequently issued an order requiring the cross-

1*/In any instance, the determination of whether a defendant is entitled to qualified imunity is to be made by the court. Mitchell, 472 U.S. at 528. The district court erred in sending that issue to the jury.

appellants to show cause why the appeal should not be dismissed for lack of jurisdiction, because it appeared the judgment entered on September 26, 1985, was a judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.2* If that were the case, the notice of appeal filed January 5, 1987, would have been untimely. See Fed. R. App. P. 4(a)(1) (A notice of appeal "shall be filed with the clerk of the district court within 30 days after the date of entry of

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2*/Rule 54(b) of the Federal Rules of Civil Procedure provides that:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims and parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. prosecution against cross-appellants, and we affirm that portion of the lower court's decision.

the judgment or order appealed from."). It appears after closer examination, however, that the September 26, 1985 judgment was not a Rule 54(b) judgment, since the district court did not make the express findings necessary for Rule 54(b) certification. See Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 3 (1980); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 45 (1956). Thus, this court does have jurisdiction and we will proceed to address the merits of the cross-appeal.

The question of whether Gunnell was entitled to prosecutorial immunity is one of law, and again our standard of review is de novo. Eastwood v. Department of Corrections of Okla., 846 F.2d 627, 629 (10th Cir. 1988).

Cross-appellants contend that the lower court erred in finding Gunnell was entitled to absolute prosecutorial immunity. In Imbler v. Pachtman, 424 U.S.

409 (1976), the Supreme Court held that a prosecutor was absolutely immune from liability under section 1983 for actions taken within the scope of "prosecutorial duties." Id. at 420. Absolute prosecutorial immunity attaches only to those activities "intimately associated with the judicial phase of the criminal process." Id. at 430. This includes the decision to initiate a prosecution. Id. at 430. This includes the decision to initiate a prosecution. Id. at 431.

Cross-appellants contended in their complaint that Gunnell violated their rights under section 1983 by initiating the prosecution against them. Under the plain language of the law as set out by the Supreme Court in Imbler, the district court in this case was correct in holding that Gunnell was absolutely immune from liability for initiating the prosecution

against cross-appellants, and we affirm that portion of the lower court's decision.

However, cross-appellants also contended in their complaint that Gunnell violated their rights under section 1983 by making certain statements to the media. The court in Imbler left open the question of whether action taken outside the prosecutor's capacity as an advocate is protected by absolute prosecutorial immunity. This circuit has held that a prosecutor is only entitled to qualified immunity when acting in an administrative or investigative capacity. Meade v. Grubbs, 841 F.2d 1512, 1532 (10th Cir. 1988); Rex v. Teeples, 753 F.2d 840, 843 (10th Cir.), cert. denied, 474 U.S. 967 (1985). In those circuits which have directly addressed the question, a prosecutor's statements to the press have been consistently considered as a part of

the prosecutor's administrative function, only entitling the prosecutor to qualified immunity. See Gobel v. Maricopa County, 867 F.2d 1201, 1205 (9th Cir. 1989); Rose v. Bartle, 871 F.2d 331, 346 (3d Cir. 1989); Powers v. Coe, 728 F.2d 97, 103 (2d Cir. 1984); Marrero v. City of Hialeah, 625 F.2d 499, 506 (5th Cir. 1980), cert. denied, 450 U.S. 913 (1981); Hampton v. Hanrahan, 600 F.2d 600, 633 (7th Cir. 1979), rev'd on other grounds, 446 U.S. 754 (1980). See also Lerwill v. Joslin, 712 F.2d 435, 437 (10th Cir. 1983) (recognizing rules set out by fifth circuit in Marrero).

We adopt the approach of the other courts of appeal which have addressed the issue now before us. Since the statements Gunnell allegedly made to the press were not made in his role as advocate, absolute prosecutorial immunity did not attach to

him. Rather, he would at the most be entitled to qualified immunity. It does not appear on the record before us whether the trial judge considered the issue of qualified immunity, and the issue is not presently before us. We will remand to the district court for a determination of qualified immunity and further proceedings consistent with this order.

III.

Finally, Hendricks and Groll have appealed the award of attorney's fees. Since the court is reversing the judgment below and remanding the case with directions to enter judgment in favor of defendants, attorney's fees were not justified in this case. The decision of the court below awarding attorney's fees in favor of plaintiffs will be vacated.

The judgment below in favor of plaintiffs-appellees is reversed and the case is remanded with directions to the court below to enter judgment in favor of defendants-appellants. The judgment below in favor of defendant-appellee Gunnell is affirmed in part and reversed in part and the cause is remanded for further proceedings consistent with this order. The award of attorney's fees entered below is vacated.

P U B L I S H

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

DENNIS ENGLAND, d/b/a VIDEO AMERICA, individually, and STANLEY NIELSEN, d/b/a VIDEO AMERICA, individually, & VIDEO USA, INCORPORATED, a Utah corporation,	)	Nos. 86-2905 87-1720
Plaintiffs-Appellees,	)	
v.	)	
RICHARD HENDIRCKS and FERRIS GROLL,	)	
Defendants-Appellants.	)	
DENNIS ENGLAND, d/b/a VIDEO AMERICA, individually, and STANLEY NIELSEN, d/b/a VIDEO AMERICA, individually,	)	
Plaintiffs-Appellants,	)	No. 87-1069
v.	)	
FRANKLIN LANNY GUNNELL, RICHARD HENDRICKS and FERRIS GROLL,	)	
Defendants-Appellees.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF UTAH
(D.C. No. 85-NC-0066W)

David R. Daines, Logan, Utah, for Plaintiffs-Appellees-Cross-Appellants.

Denton M. Hatch (Wesley M. Lang with him on the brief) of Christensen, Jensen & Powell, P.C., Salt Lake City, Utah, for Defendants-Appellants-Cross-Appellees Hendricks and Groll.

Jody K. Burnette, of Snow, Christensen & Martineau, Salt Lake City, Utah, for Defendant-Appellee Gunnell.

Before TACHA, Circuit Judge, SETH, Senior Circuit Judge, and SAFFELS, District Judge.*

SAFFELS, District Judge

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*Honorable Dale E. Saffels, United States District Judge for the District of Kansas, sitting by designation.

(Filed)
United States Court of Appeals
Tenth Circuit

JUN 12 1989

ROBERT L. HOECKER
Clerk

After a videotape rental store in Logan City, Utah rented an allegedly pornographic tape to a minor, the Logan City police began an investigation of the store's owners, Stan Nielsen ("Nielsen") and Dennis England ("England"). Utah Code Sec. 76-10-1206 made it a criminal offense to distribute harmful materials to minors. The county attorney, Franklin Lanny Gunnell ("Gunnell") and Officer Richard Wright ("Wright") of the Logan City Police Department met with England and Nielsen regarding the tape rental and advised Nielsen of their duty to comply with Utah Code Sec 76-10-1206. The Logan City police continued monitoring the video rental store, and on April 23, 1983, two minors, acting as police informants, rented allegedly pornographic tapes from an employee of the store. The parties appear to dispute whether the investigating officer on April 23, Officer

Richard Hendricks ("Hendricks"), witnessed the transactions. It does appear, though, that based on information given by Hendricks on April 25, the county attorney prepared an Information charging England with a violation of Utah Code Sec 76-10-1206.

Hendricks called England to the police station where he planned to serve England with a summons. When England arrived at the police station, Hendricks determined that he was not the person who had actually rented the movies to the informant. Because of this mistake, Hendricks went to talk to the county attorney, Gunnell, before he served England with the summons. Hendricks told Gunnell that England had been misidentified. Gunnell determined that both owners could be charged as aiders and abettors, pursuant to Utah Code Sec 76-10-1201(4). Gunnell prepared an amended

Information and both England and Nielsen were served with a summons. At the preliminary hearing in the case, the judge dismissed the charges, determining that the two had not been charged properly under Utah's aiding and abetting statute.

England and Nielsen, along with their wives, cross-appellants Marlene England

and Jan Nielsen.*1 filed suit against Hendricks, Gunnell and Ferris Groll, Logan City Chief of Police. They brought the suit pursuant to 42 U.S.C. Sec 1983, contending that defendants violated their constitutional rights to due process and equal protection by improperly charging them with aiding and abetting the distribution of harmful materials to minors.

The court granted summary judgment in favor of Gunnell on the grounds that he was absolutely immune from liability for

*1/Ms. England and Ms. Nielsen contended that the improper criminal charges leveled against their husbands, and the ensuing publicity which resulted, caused injury to the videotape rental business, of which they claimed they were partners. On September 18, 1985, the district court, without explanation, granted defendants' motion to dismiss Ms. England and Ms. Nielsen as plaintiffs to the action. On appeal they also contend this dismissal was in error. The court need not address this point, however, since the court determines today that defendants Hendricks and Groll were immune from suit and their appeal regarding defendant Gunnell was untimely filed.

his actions taken in his capacity as prosecuting attorney. Hendricks and Groll contended in a motion for summary judgment that they were entitled to qualified immunity, but the court rejected their argument. Instead, the case proceeded to trial and the trial court also rejected the qualified immunity argument in a timely motion for directed verdict. The judge sent the question of qualified immunity to the jury, and the jury returned with a verdict in favor of England and Nielsen. The court subsequently awarded plaintiffs their attorney's fees pursuant to 42 U.S.C. Sec. 1988.

In these consolidated appeals, Hendricks and Groll appeal the court's denial of their motions for summary judgment and for directed verdict on the grounds that they were entitled to qualified immunity. England and Nielsen,

along with their wives, appeal the court's dismissal of Gunnell as a party defendant. Finally, Hendricks and Groll appeal the award of attorney's fees.

I.

The issue of whether Hendricks and Groll were entitled to qualified immunity is a question of law. Thus, our standard of review on appeal is de novo. Eastwood v. Dept. of Corrections of Okla., 846 F.2d 627, 629 (10th Cir. 1988).

A government official may plead the affirmative defense of qualified immunity in an action brought pursuant to 42 U.S.C. Sec. 1983. Gomez v. Toledo, 446 U.S. 6735, 640 (1980). The affirmative defense of qualified immunity is available to all government officials, including police officers. Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 3038 (1987). The government official will be immune from

liability if the conduct alleged in the complaint did not violate "clearly established, statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The Supreme Court in Harlow rejected the former subjective inquiry into the governmental official's motives, as previously set out in Wood v. Strickland, 420 U.S. 308, 322 (1975). Harlow, 457 U.S. at 815. Under the rule announced in Harlow, the courts are now limited to inquiring into the objective reasonableness of the official's actions. ID. at 816. The question of whether the official acted in an objectively reasonable manner is one to be resolved by the court. Mitchell v. Forsyth, 472 U.S. 511, 528 (1985). The court is to determine what the current applicable law is and whether that law was clearly

established at the time the official's action occurred. Harlow, 457 U.S. at 818.

On the facts before us, then, Hendricks and Groll would be entitled to qualified immunity if it was not clearly established under Utah law at the time of their actions that a store owner could not be charged under the aiding and abetting statute for distributing materials harmful to minors. Utah Code Sec 76-10-1206 provides that:

> A person is guilty of dealing in harmful material when knowing that a person is a minor or having failed to exercise reasonable care in ascertaining the proper age of a minor he: (a) knowingly distributes or offers to distribute, exhibits or offers to exhibit any harmful materials to a minor.

At the time of the officer's actions, there were no relevant Utah Supreme Court cases interpreting this statute. Utah Code 76-2-202 provides that a person may be convicted as an aider and abettor if

that person acts "with the mental state required for the commission of an offense" and "solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense." After Hendricks consulted with Gunnell, Gunnell determined that at least under his interpretation, they could prosecute the owners of a video store under the Utah aiding and abetting statute for distributing harmful material to minors, even if they were not sure whether the owners were the persons who had actually rented the tapes to the minors.

The court need not decide whether Utah law allows a video store owner to be charged as an aider and abettor for violating Utah Code Sec. 76-10-1206. There is no case law in Utah which would have given the county attorney or the officers any guidance as to whether the

aiding and abetting statute could have been used in this instance. Nor is it readily apparent from the statutory language that section 76-2-202 could not have been used here; in fact, a reasonable argument could be made that the section could have been used. Since the decision to charge did not violate clearly established law at the time of the officers' actions, they are immune from suit. Further, in an instance such as the one presented, where the law is unclear, a police officer is immune if the officer consulted with and relied upon the advice of a county attorney. Lavicky v. Burnett, 758 F.2d 468, 476 (10th Cir. 1985). Thus, the officers were entitled to qualified immunity, and the district court's decision to deny Hendricks and Groll's motions for summary judgment and for directed verdict and to send the issue to

the jury was in error.*2 This case will be remanded with directions to enter judgment in favor of defendants Hendricks and Groll.

II.

England and Nielsen, along with their wives, filed a cross-appeal contending that the court's order granting Gunnell summary judgment on the grounds he was entitled to absolute prosecutorial immunity was in error. The order of summary judgment was entered on September 26, 1985. Judgment on that order was entered on the same day. The cross-appellants did not file their notice of appeal, however, until January 5, 1987, after the trial on the remaining claims was completed.

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*2/In any instance, the determination of whether a defendant is entitled to qualified immunity is to be made by the court. Mitchell, 472 U.S. at 528. The district court erred in sending that issue to the jury.

Rule 54(b) of the Federal Rules of Civil Procedure provides that:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims and parties.

The judgment entered by the court below on September 26, 1985 on its order of summary judgment appears to have been such a judgment. Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides that a notice of appeal "shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from." The notice of appeal from the judgment of September 26, 1985, was not filed until over a year later, on January 5, 1987. Therefore, the appeal was not timely filed as required by Rule 4(a)(1) of the Federal

Rules of Appellate Procedure, and this court has no jurisdiction to entertain the cross-appeal of the district court's order of summary judgment in favor of defendant Franklin Lanny Gunnell, and the cross-appeal will be dismissed.*3

III.

Finally, Hendricks and Groll have appealed the award of attorney's fees. Since the court is reversing the judgment below and remanding the case with directions to enter judgment in favor of defendants, attorney's fees were not justified in this case. The decision of the court below awarding attorney's fees in favor of plaintiffs will be vacated.

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*3/The court recognizes that a jurisdictional question was raised earlier in this appeal, and that this court ultimately determined it did have jurisdiction. However, a different problem was at issue there, that of whether an intervening holiday had made the filing of the appeal one day late. The court addresses an entirely different issue today.

The judgment below in favor of plaintiffs-appellees is reversed and the case is remanded with directions to the court below to enter judgment in favor of defendants-appellants. The cross-appeal is dismissed for lack of jurisdiction. The award of attorney's fees entered below is vacated.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DENNIS ENGLAND, d/b/a VIDEO AMERICA, Individually, and STANLEY NIELSEN, d/b/a VIDEO AMERICA, Individually, and VIDEO USA, INCORPORATED, a Utah corporation,	)	
Plaintiffs-Appellees,	)	No. 86-2905 87-1720
v.	)	
RICHARD HENDRICKS and FERRIS GROLL,	)	
Defendants-Appellants.	)	
DENNIS ENGLAND, d/b/a VIDEO AMERICA, Individually, and STANLEY NIELSEN, d/b/a VIDEO AMERICA, Individually,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 87-1069
FRANKLIN LANNY GUNNELL,	)	
Cross-Appellee,	)	
RICHARD HENDRICKS and FERRIS GROLL,	)	
Defendants.	)	

ORDER

Before TACHA and SETH, Circuit Judges, and SAFFELS,* District Judge.

*The Honorable Dale E. Saffels, United States District Judge for the District of Kansas, sitting by designation.

On the court's own motion, it is ordered as follows:

1. The opinion filed June 12, 1989, is withdrawn; and

2. The judgment is vacated.

Entered for the Court

(Signature)

ROBERT L. HOECKER, Clerk

FILED
United States Court of Appeals
Tenth Circuit

JUN 14 1989
ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DENNIS ENGLAND and STANLEY NIELSEN individually and doing business as VIDEO AMERICA, Logan, Utah; and their wives, MARLENE ENGLAND and JAN NIELSEN; and VIDEO, USA, INC., a Utah corporation, Plaintiffs-Appellees, v.	)	FILED United States Court of Appeals Tenth Circuit SEP 28 1989 HOECKER
RICHARD HENDRICKS and FERRIS GROSS, Defendants-Appellants, and FRANKLIN LANNY GUNNELL, Defendant.	)	Nos. 86-2905 87-1720
DENNIS ENGLAND and STANLEY NIELSEN individually and doing business as VIDEO AMERICA, Logan, Utah, Plaintiffs-Appellants, and their wives, MARLENE ENGLAND and JAN NIELSEN; and VIDEO, USA, INC., a Utah corporation, Plaintiffs, v. RICHARD HENDRICKS, FERRIS GROLL and FRANKLIN LANNY GUNNELL, Defendants-Appellees.	)	No. 87-1069

ORDER

Before HOLLOWAY, SETH, McKAY, LOGAN, SEYMORE, MOORE, ANDERSON, TACHA, HALDOCK, BRORBY, EBEL, Circuit Judges and SAFFELS, District Judge.*

This matter comes on for consideration of appellees/cross-appellants' petition for rehearing with suggestion for rehearing en banc, filed in the captioned case.

Upon consideration of the petition for rehearing, the petition is denied by the panel to whom the case was argued and submitted.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all the judges of the court in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By Signature
Deputy Clerk

*The Honorable Dale E. Saffels, United States District Judge for the District of Kansas, sitting by designation.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

DENNIS ENGLAND and
STANLEY NIELSEN,

Plaintiffs,

JUDGMENT ON
JURY VERDICT

-vs-

RICHARD HENDRICKS
and FERRIS GROLL,

Civil No:
85-NC-0066W

Defendants.

Based on the verdict of the jury entered in this case and good cause appearing.

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. Judgment is hereby entered in favor of the plaintiff Dennis England against the defendants Richard Hendricks and Ferris Groll, jointly and severally, for the sum of Twenty-Five Thousand Dollars ($25,000.00), which amount shall

bear interest from the date hereof at the rate prescribed by 28 U.S.C. Sec. 1961.

2. Judgment is hereby entered in favor of the plaintiff Stanley Nielsen against the defendants Richard Hendricks and Ferris Groll, jointly and severally, for the sum of Twenty-Five Thousand Dollars ($25,000.00), which amount shall bear interest from the date hereof at the rate prescribed by 28 U.S.C. Sec. 1961.

3. Pursuant to 42 U.S.C. Sec. 1988 plaintiffs may apply to the court for allowance of their costs, including a reasonable attorneys fee, as against the defendants.

Dated this 20 day of November, 1986.

David K. Winder
United States District
Judge

Mailed a copy of the foregoing to the following named counsel this 20 day of November, 1986.

David R. Daines, Esq.
USU Box 1328
Logan, Utah 84322

Denton M. Hatch, Esq.
Wesley M. Lang, Esq.
900 Kearns Building
Salt Lake City, Utah 84101

Lois G. Elder
Secretary

MINUTES OF THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF UTAH

CENTRAL DIVISION_____ CIVIL HEARING__X__

NORTHERN DIVISION_X__ CRIMINAL HEARING___

DATE September 25, 1986

CASE NO. NC 85-66 Dennis England & Stanley Nielsen, etc. vs Richard Hendricks, etal.

HON. ALDON J. ANDERSON _____
HON. BRUCE S. JENKINS _____
HON. DAVID K. WINDER ___X__
DEPUTY CLERK Hana Shirata
COURT REPORTER Shirlyn Sharpe

APPEARANCE OF COUNSEL

PLAINTIFFS, England & Nielsen, present with David R. Daines, Esq.
DEFENDANT, Denton M. Hatch, Esq.

CALENDARED FOR: (1) Defendants' motion for summary judgment, with opposition thereto; (2) PRETRIAL

Came on for hearing on defendants' motion for summary judgment with objections thereto and (2) Pretrial. After hearing arguments of counsel, court rules as follows:

(1) Defendants' motion for summary judgment, with opposition thereto - court denied the motion.
(2) Pretrial - Mr. Denton to prepare a proposed pretrial order within ten (10) days; submit it to Mr. Daines for approval as to form. If counsel are unable to agree, Mr. Daines has five (5) days within which to object.

Court indicated that by agreement of counsel, he would refer the matter to the Magistrate for a settlement conference. Setting to be obtained from the magistrate.

Deputy Clerk hs

No. 89-1025

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

DENNIS ENGLAND, STANLEY NIELSEN,
MARLENE ENGLAND and JAN NIELSEN,
Petitioners,

v.

RICHARD HENDRICKS and FERRIS GROLL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS

Denton M. Hatch
Counsel of Record
Wesley M. Lang
CHRISTENSEN, JENSEN & POWELL, P.C.
510 Clark Leaming Building
175 South West Temple
Salt Lake City, Utah 84101
(801) 355-3431
Counsel for Respondents

January 25, 1990

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TABLE OF AUTHORITIES

CASES

STATUTES

STATUTES INVOLVED

42 U.S.C.A. §1983 (1981)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

U.C.A. §76-2-202 (1978)

Criminal responsibility for direct commission of offense or for conduct of another.--Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

U.C.A. §76-10-1206 (1978)

Dealing in harmful material to a minor.--(1) A person is guilty of dealing in harmful material when, knowing that a person is a minor, or having failed to exercise reasonable care in ascertaining the proper age of a minor, he:

(a) Knowingly distributes or offers to distribute, exhibits or offers to exhibit, any harmful material to a minor; . . .

U.C.A. §76-10-1201 (1978)

Definitions.--For purposes of this part: . . . (4) "Knowingly" means an awareness, whether actual or constructive, of the character of material or of a performance. A person has constructive knowledge if a reasonable inspection or observation under the circumstances would have disclosed the nature of the subject matter and if a failure to inspect or observe is either for the purpose of avoiding the disclosure or is criminally negligent.

STATEMENT OF THE CASE

The following facts are necessary to correct inaccuracies and omissions in the Petition for Certiorari. Petitioners' frequent conclusory statements without any citation to the record makes response difficult, because it is not clear to which part of the record they refer. Where this occurs, respondents' response lacks specificity being unavoidably limited by the vagueness of the assertion.

1. On page 4, petitioners allege that the officers "signed (and authorized) second degree felony Informations against the husband petitioners, charging them jointly with two felony counts of knowingly distributing harmful, (R-rated) videos to a minor and failing to exercise reasonable care to ascertain the minor's age." This is incomplete. While it is

true that the owners were charged under Utah's statute prohibiting the distribution of harmful material to minors, the county attorney, not the officers, made the decision, and authorized and prepared the Information. The basis for charging the store owners was Utah's Aiding and Abetting or "Criminal Responsibility for...Conduct of Another" Statute. (Tr. at 84, 517, 522-6, 531-5).

2. On page 5, petitioners claim they were branded as "alleged porno dealers" in a "publicity blitz". The officers did not use "pornography" or a derivative word in a public statement. Officer Hendricks made no public statement. (Tr. at 158-9). Officer Groll was not questioned about the media or public statements.

3. On page 5, petitioners state the evidence showed that the subject videos "were not X-Rated or pornographic." This

is irrelevant and inaccurate. It is irrelevant because pornography is not an element of the offense. Petitioners stipulated at trial that the tapes were harmful to minors. It is inaccurate because petitioner England testified that the last two of four videos rented were X-Rated and the rating was changed to "R". (Tr. at 351, 363). According to the police department and the county attorney, the first video was possibly pornographic. (Tr. at 186, 513).

4. On page 5, petitioners allege that the Tenth Circuit improperly found that the videos were "pornographic." The Tenth Circuit made no such finding. The Tenth Circuit used the words "allegedly pornographic tapes." 880 F.2d at 282.

5. On page 7, petitioners claim "respondents never appealed from the summary judgment order denying immunity."

Respondents made a timely appeal after final judgment was entered. Petitioners raised no issue of timeliness before the Tenth Circuit.

6. On page 7, petitioners claim "windfalls for the plaintiffs" and a "flood of incriminating admissions by Chief Groll, Officer Hendricks, and Prosecutor Gunnel." There is no citation to the record and it is impossible to know to what they refer. There were no incriminating admissions made by Chief Groll, Officer Hendricks or Prosecutor Gunnel. At trial, petitioners claimed Officer Hendricks lied about seeing Nielsen pass the tapes. There is no evidence of this. Officer Hendricks saw the girls approach Nielsen with the tapes. He did not see them purchase the tapes. (Tr. at 44-7). He relied on his knowledge that the girls approached an owner

(Hendricks knew it was an owner because he saw the owners meet earlier with the county attorney), the girls description of who sold the tapes, and confirmation of the description by Officer Wright and Dennis England. (Tr. at 53-4, 82, 124-5, 314).

7. On page 8, petitioners claim the State Director of Police Officers Standards "proved" that the officers "admitted acts and practices grossly violated the training standards." The officers called Clyde Palmer, Director of Utah Peace Officers Standards and Training. On cross examination, he admitted that an officer who lies is unethical, but he said that based on his review of the case, the officers acted reasonably in consulting the county attorney, in making their identification, and there was no arrest. (Tr. at 444,

448-9, 451). The owners called no experts.

8. On page 8, petitioners claim the jury found "the facial appearance of probable cause on the Information was supplied by grossly perjured statements of Hendricks." The jury made no finding of perjury. The jury rendered a general verdict. (See General Verdict, District Court, Docket Entry No. 56). Again, it is impossible to know exactly to what petitioners refer. However, if petitioners mean that Hendrick's signing of the criminal Information as the complaining witness was perjurious, they are wrong. The complaining witness does not have to be an eyewitness, but may simply allege "on information and belief", as stated on the face of the Information. (Trial Exhibits 4 and 6; Tr. at 520).

9. On page 8, petitioners allege that

"Chief Groll openly and defiantly claimed the right to apply vicarious felony liability theories to the non-resident shop owners, but not to the other resident or corporate owners whose clerks were caught in the same operation." This is vague and inaccurate. There is no issue of residency. Both petitioners were residents of Utah. They resided outside the county where they did business, but this is irrelevant. Chief Groll understood the difference between vicarious liability of an owner and criminal liability for the conduct of another which requires more than ownership. (Tr. at 175).

10. On page 8, petitioners claim the officers charged them with direct distribution and not aiding and abetting. First, the county attorney, not the officers, prepared the Amended Information

and charged the owners. (Tr. at 83-4, 524-5). Second, under the statute, an aider and abettor is charged as a principal. The statute says: "Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct." Utah Code Ann. §76-2-202 (1978) (emphasis added).

11. On page 8-9, petitioners claim admissions by Officer Groll "that there was a publicity campaign motive." No admissions are in the record. Chief Groll did not even testify about publicity.

12. On page 9, petitioners claim the publicity surrounding the arrest "permanently ruined the husbands' and

wives' video business in the community." There was substantial evidence that market changes, change in store location, and other business factors caused decline of the business. (Tr. at 475-497).

13. On page 9, petitioners refer to "surprise admissions and other conclusive and substantial evidence of a local police state as constitutionally corrupt and discriminatory in its own way as those local enforcement systems that gave rise to the Civil Rights Act." This interpretation of the evidence is unfounded.

14. On page 9, petitioners claim that Officer Groll "defiantly refused to accept Judge Winder's instructions on basic law of probable cause evidence and prohibited vicarious felony liability." This is false. During the exchange between the trial judge and Officer Groll, to which the owners are referring, Officer Groll

made the following statement:

> Without prejudice, I have not been in a courtroom where the defendants have been treated with as much bias by the court, your Honor. And I feel that in this case and I intend to write you a letter when we get through. I feel that there have been times when you have made statements about my conduct, the county attorney's conduct, and whether I'm intelligent enough to be a police officer. That is biasing the jury's opinions of me, and quite frankly, the tears shed here by the plaintiffs are not nearly as much as my wife's because of my reputation here alleged by this suit.
>
> And now, to answer your question, sir. I respectfully sit here and listened to the county attorney, I have read the statute and I will have to think a long time to change my thinking about who can aid and abet in violating the law. I'm sorry, I should be standing up. And I will have to consider that quite strongly, but you don't need to dress me down in this courtroom. I am not a rookie police officer. I've been one for 24 years, and I have been a chief of police for 7 years.

(Tr. at 541-2).

15. On page 10, petitioners state that

the officers appealed on the "grounds that they were immune as a matter of law." This is true as far as it goes. However, the officers also argued:

a. The officers were immune as a matter of law because they did not violate clearly established law.

b. The officers were immune because they consulted with and relied on the county attorney.

c. There was no constitutional violation. Petitioners alleged arrest in their complaint, but abandoned false arrest, claiming only that they were prosecuted without probable cause. (Brief of Appellees, May 28, 1987, at p.10). The county attorney, not the officers, prosecuted them.

d. The district court committed reversible error in ruling on the evidence and instructing the jury. The specific

instructions and rulings cited were as follows:

(1) The court erred in failing to instruct the jury that the officers were immune if they relied on the county attorney.

(2) The court erred in failing to instruct that the owners must prove arrest without probable cause, or, in the alternative, malice on the part of the police officers.

(3) The court refused to give an instruction defining "knowingly" as found in Utah Code Ann. §76-10-1201(4) (1978), and stated in front of the jury that it saw no evidence that the owners had committed a crime.

(4) The court erred in failing to exclude evidence of lost profits, or, in the alternative, should have instructed that truth is a defense.

(5) The court failed to instruct the jury regarding the duty of a video store owner under Utah law.

(6) The court erred when it did not allow the jury to view the video tapes as evidence of the degree of criminal negligence or recklessness of the owners.

16. On pages 11-16, petitioners attempt to characterize the Tenth Circuit's decision. The decision speaks for itself.

17. On page 15, petitioners allege that Eastwood v. Department of Corrections of Oklahoma, 846 F.2d 627 (10th Cir. 1988), "counters the Tenth Circuit conclusions" regarding "what Utah law prescribes in terms of vicarious liability." Eastwood contains no discussion of Utah vicarious liability law.

18. The statement of facts also contains erroneous arguments of law. These are analyzed below.

ARGUMENT

I. QUALIFIED IMMUNITY IS NOT WAIVED BY GOING TO TRIAL

Petitioners waived the argument that failure to appeal a summary judgment order denying qualified immunity constitutes waiver of the defense, because they did not raise it at trial or on appeal. This is the first time petitioners raise it. The Court of Appeals raised the issue in oral argument, but there is no indication that the Court considered it. The Court of Appeals' opinion makes no mention of it. Therefore, the issue of waiver is not properly before this Court. Adickes v. S.H. Kress & Company, 398 U.S. 144, 148; 90 S.Ct. 1598, 1602-3, n.1 (1970); Lawn v. United States, 355 U.S. 339, 362-3; 78 S.Ct. 311, 324, n.16 (1958).

In addition, petitioners' argument finds no support in Mitchell v. Forsyth, 472

U.S. 511; 105 S.Ct. 2806 (1985), or any other decision. Mitchell simply ruled that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C.A. §1291 notwithstanding the absence of a final judgment." 472 U.S. at 530. In support of this ruling, the Supreme Court noted that qualified immunity is "an immunity from suit rather than a mere defense to liability." Id. at 527. So understood, a pre-trial denial of absolute immunity must be considered an appealable interlocutory order because a right to immunity from suit is "effectively" lost "if a case is erroneously permitted to go to trial." Id. at 527.

Petitioners' interpretations of the foregoing excerpts from Mitchell are

fatally flawed in two respects. First, the scope of an official's qualified immunity under Mitchell is not limited to "an entitlement not to stand trial," but also includes an immunity from damages. Lovell v. One Bancorp, 878 F.2d 10, 12 (1st Cir. 1989); McIntosh v. Weinberger, 810 F.2d 1411, 1431 n.7 (8th Cir. 1987), vacated on other grounds, Turner v. McIntosh, 487 U.S. _____; 108 S. Ct. 2861 (1988) (qualified immunity under Mitchell also envisions protecting public officials from being subjected to monetary liability). Therefore, qualified immunity continues to protect public officials even after the case goes to trial. Second, petitioners confuse the Mitchell Court's concern for shielding government officials from the costs and burdens of trial with the substantive issue of waiver of a qualified immunity defense. Contrary to

petitioners' view, the analysis in Mitchell went only to the issue of the appealability of a pre-trial order denying qualified immunity under the collateral-order rule set forth in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541; 69 S.Ct. 1221 (1949). Mitchell makes no mention whatever of any rule of waiver of qualified immunity for failure to appeal a summary judgment order denying the same defense. As a general rule, a defendant waives the affirmative defense of qualified immunity only upon failure to present the defense before the court in a proper and timely manner. See Walsh v. Mellas, 837 F.2d 789, 799 (7th Cir.), cert. denied, 108 S.Ct. 2832 (1988), citing Harlow v. Fitzgerald, 457 U.S. 800, 815; 102 S.Ct. 2727, 2736 (1982). Respondents' assertion of qualified immunity in a Motion for Summary Judgment

and a Motion for Directed Verdict essentially negated any possibility of waiver in this case.

Finally, circuit cases expressly reject the same waiver argument relied upon by petitioners. In McIntosh, the Eighth Circuit Court of Appeals dismissed the plaintiffs' suggestion that the defendant "surrendered his qualified immunity defense by failing to appeal immediately the District Court's denial of summary judgment on this ground." 810 F.2d 1411, 1431 n. 7 (8th Cir. 1987), vacated on other grounds, Turner. The McIntosh Court explained,

> Mitchell did, as plaintiffs emphasize, recognize that the rejection of a qualified-immunity summary-judgment motion is an appealable final order under 28 U.S.C. §1291 and the collateral-order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), reasoning that qualified immunity is due in part to concern over the cost to effective

> government of requiring public officials to stand trial, 105 S. Ct. at 2815, a concern that is moot where the trial is already completed. Yet, Mitchell clearly recognizes that qualified immunity is also concerned with protecting public officials from being subjected to monetary liability for their official actions, and this concern of course remains substantial even where trial has gone forward. See Mitchell, 105 S. Ct. at 2815, citing Harlow v. Fitzgerald, 457 U.S. at 816, 102 S.Ct. at 2737. Hence we conclude that, as is generally the case for appealable interlocutory orders, see Scarrella v. Midwest Federal Savings & Loan, 536 F.2d 1207, 1209 (8th Cir.), cert. denied, 97 S.Ct. 237, 50 L.Ed.2d 166, 429 U.S. 885 (1976); 9 Moore's Federal Practice, para. 110.18 (1986), failure immediately to appeal the rejection of a qualified-immunity defense does not bar raising it on appeal after trial.

Id. (emphasis added). Additionally, the First Circuit Court of Appeals noted in Kaiter v. Town of Boxford, 836 F.2d 704, 708 n.3 (1st Cir. 1988), that a defendant retains the right to challenge any pre-

judgment rulings relative to immunity, whether absolute or qualified, "in an appeal from a final judgment." See also Noe v. Stockwell, 630 F.Supp. 334, 336-7 (E.D. Tex 1986) (fact that case went to trial precluded an interlocutory appeal under Mitchell, but defendant's qualified immunity defense was still viable at trial and upon appeal).

Petitioners claim on page 20 that a "critical reason" for granting Certiorari is that the Tenth Circuit will "misconstrue conclusive facts and alter clearly established law to support clearly unconstitutional local police action." (Petition at p. 20). This claim of diabolical motive is unfounded.

II. THE STANDARD OF REVIEW IN THIS CASE IS DE NOVO

According to petitioners' argument, the fact that the subject case went to trial

precludes de novo review of qualified immunity issues. Petitioners contend that Eastwood, where the Tenth Circuit adopted Mitchell and reviewed de novo an appeal from a district court's denial of defendant's motion to dismiss on qualified immunity grounds, 846 F.2d at 628, is inapplicable to the case at bar in absence of an interlocutory appeal of qualified immunity.

Petitioners, however, fail to provide the Court with any case law limiting de novo scrutiny to appellate review of interlocutory orders concerning qualified immunity. Moreover, the Mitchell decision never makes any distinction between de novo appellate review of interlocutory orders and final judgments, implying that all appealable issues of qualified immunity are "purely legal question[s]." 472 U.S. 511, 530 (1985). Thus, the Tenth

Circuit's application of Eastwood and Mitchell's de novo standard of review to the purely legal question of respondent Hendrick's qualified immunity in no way exceeds the Seventh Amendment's ban on appellate review of factual issues tried by a jury. See Rakovich v. Wade, 850 F.2d 1180, 1201-1202 (7th Cir.), cert. denied, 109 S.Ct. 497 (1988) (jury's role does not extend to determination of immunity because the issue of qualified immunity is a legal question for the trial court, not the jury); McIntosh, 810 F.2d at 1411 (standard of review was de novo even though defendant had not appealed pre-trial order denying qualified immunity).

The petitioners' citation of Denver & Rio Grande Western Railroad Co. v. Conley, 293 F.2d 612 (10th Cir. 1961), on this issue is inapposite. This case simply stands for the proposition that an

appellate court may overturn a jury verdict regarding factual matters only "when there is a complete absence of probative facts." 293 F.2d at 613. Because the issue of defendant Hendrick's qualified immunity is a "purely legal question," Mitchell, 472 U.S. at 530; 105 S.Ct. at 2817, Denver & Rio Grande is irrelevant to the case at hand.

Finally, petitioners' discussion of an "inflammatory finding of 'allegedly pornographic video'" and "judicial libeling" (Petition at p. 23, 25) is inaccurate and irrelevant. See paragraphs 2 and 3 of the Statement of the Case above.

III. THE OFFICERS ARE QUALIFIEDLY IMMUNE ON THE BASIS THAT THEIR CONDUCT WAS OBJECTIVELY REASONABLE

In Harlow, this court held that where the applicable law is not clearly

established at the time the official's action occurred, the official is entitled to qualified immunity under 42 U.S.C. §1983. Id. at 818. The law at issue in the present case was the Utah statute prohibiting distribution or dealing in harmful materials to minors. This law states:

> A person is guilty of dealing in harmful material when, knowing that a person is a minor or having failed to exercise reasonable care in ascertaining the proper age of a minor, he:
> (a) knowingly distributes or offers to distribute, exhibits or offers to exhibit any harmful materials to a minor . . ..

Utah Code Ann. §76-10-1206 (1978).

The petitioners were charged with aiding and abetting in the violation of this statute. Utah Code §76-2-202 provides that a person may be convicted as an aider and abettor if that person acts,

> ... with the mental state required for the commission of an offense [and] solicits,

> requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense.

At the time of the officers' actions, there were no relevant Utah Supreme Court cases interpreting the Harmful Material to Minors Statute. The police officers consulted the county attorney. The officers told the county attorney that at least one owner was out-of-town when the video tapes were sold. The county attorney prepared Informations and charged both petitioners. Given the uncertainty of the law, and the county attorney's advice, a reasonable police officer could conclude his conduct was lawful. See Lavicky v. Burnett, 758 F.2d 468, 476 (10th Cir. 1985).

The cases petitioners cite have no application to this issue. State v. Comish, 560 P.2d 1134 (Utah 1977), simply interprets the Utah statute for "aiding

and abetting" in the context of a sale of illegal drugs, shedding no light whatsoever on how the "aiding and abetting" statute should be interpreted with regards to "knowingly distributing harmful materials to minors" under Utah Code §76-10-1206. Other cases cited by the petitioners have nothing to do with the crime of "knowingly distributing harmful materials to minors" under Utah Code §76-10-1206. See State v. Blue, 53 P. 978 (Utah 1898) (embezzlement); State v. Allen, 189 P. 84 (Utah 1920) (larceny); State v. Stenback, 2 P.2d 1050 (Utah 1931) (homicide); or State v. Leek, 39 P.2d 1091 (Utah 1934) (forgery).

Petitioners argue on page 31 that this case constitutes "implementation of local totalitarian police states with Circuit Court sanction." Circuit and police bashing, found in this and other places in

the Petition, is inappropriate and unfounded.

Finally, on pages 28-30, petitioners' quote portions of pages 540-544 of the Court record. A complete copy of this portion of the trial record is attached to the Appendix. Reliance on this part of the trial record is misplaced. The District Judge engaged in extrajudicial activity and called Chief Groll to repentance during the trial. The Judge's comments are not a basis for granting Certiorari. They are evidence of prejudicial statements against the officers which issue they raised on appeal.

IV. THE ISSUE OF PUNITIVE DAMAGES IS NOT PROPERLY BEFORE THE COURT

Petitioners maintain the District Court "abused its discretion" in vacating the attorneys fees award, dismissing claims of the wives for lack of standing, and deny-

ing the issue of punitive damages. However, petitioners do not argue these as a basis for granting Certiorari, and respondents will not address them in this Opposition to Certiorari. Procedurally, however, the petitioners never raised the issue of punitive damages at the trial of this matter, did not submit any jury instructions except for a directed verdict, and did not object to the instructions given. (Tr. at 553, 640-41; District Court Minute Entry, November 3, 1986.) Hence, the issue was never properly raised before the Court of Appeals. It is well established that the Supreme Court will not consider issues not properly raised or preserved below. Adickes v. S.H. Kress & Company, 398 U.S. 144, 148; 90 S.Ct. 1598, 1602-3, n.1 (1970); Lawn v. United States, 355 U.S. 339, 362-3; 78 S.Ct. 311, 324, n.16 (1958).

CONCLUSION

For the reasons set forth above, the respondents herein submit that a Writ of Certiorari should not be granted in this case.

Respectfully submitted,

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APPENDIX A

THE COURT: WELL, YOU GO AHEAD AND MAKE IT, BUT THE SAME THING APPLIES. THERE IS NO WAY AFTER BEING HERE FOR THIS LENGTH OF TIME THAT--I WILL TELL YOU THIS, AND SIT DOWN A MINUTE. I HAVE THOUGHT ABOUT DIRECTING A VERDICT AT LEAST AGAINST CHIEF GROLL BECAUSE CHIEF GROLL, LIKE THE COUNTY ATTORNEY HERE, TESTIFIED THAT HE THOUGHT THEN AND STILL THINKS THAT AN OWNER CAN BE CHARGED UNDER THIS STATUTE SIMPLY BECAUSE HE'S AN OWNER, IN WHICH IT IS INCREDIBLE TO ME, BUT THAT IS NOT THE LAW. MOST EMPHATICALLY, AS I HAVE ALREADY DISCUSSED, THERE JUST ISN'T ANY DOUBT ABOUT THAT. BUT I'M NOT GOING TO DIRECT A VERDICT AGAINST HIM. I'M GOING TO SUBMIT IT TO THE JURY.

I THINK THERE IS DEFINITELY A JURY ISSUE AS FAR AS MR. HENDRICKS, BUT MR. GROLL IN HIS TESTIMONY DIDN'T SEEM TO RELY ON THE COUNTY ATTORNEY. HE APPARENTLY

HASN'T EVEN LEARNED FROM THESE PROCEEDINGS, AND YOU DON'T CHARGE PEOPLE WITH FELONIES BASED ON VICARIOUS LIABILITY, CHIEF GROLL. I MEAN, PEOPLE TO BE VIOLATING THE CRIMINAL LAWS HAVE GOT TO THEMSELVES PERSONALLY WITH INTENT BE INVOLVED IN THE ELEMENTS OF THE CRIME. DO YOU UNDERSTAND THAT NOW?

MR. GROLL: YOUR HONOR, ARE YOU ALLOWING ME TO SPEAK TO YOU?

THE COURT: I CERTAINLY AM.

MR. GROLL: WITHOUT PREJUDICE, I HAVE NOT BEEN IN A COURTROOM WHERE THE DEFENDANTS HAVE BEEN TREATED WITH AS MUCH BIAS BY THE COURT, YOUR HONOR. AND I FEEL THAT IN THIS CASE AND I INTEND TO WRITE YOU A LETTER WHEN WE GET THROUGH. I FEEL THAT THERE HAVE BEEN TIMES WHEN YOU HAVE MADE STATEMENTS ABOUT MY CONDUCT, THE COUNTY ATTORNEY'S CONDUCT AND WHETHER I'M INTELLIGENT ENOUGH TO BE A POLICE OFFICER.

THAT IS BIASING THE JURY'S OPINIONS OF ME, AND QUITE FRANKLY, THE TEARS SHED HERE BY THE PLAINTIFFS ARE NOT NEARLY AS MUCH AS MY WIFE'S BECAUSE OF MY REPUTATION HERE ALLEGED BY THIS SUIT.

AND NOW, TO ANSWER YOU QUESTION, SIR. I RESPECTFULLY SIT HERE AND LISTENED TO THE COUNTY ATTORNEY, I HAVE READ THE STATUTE AND I WILL HAVE TO THINK A LONG TIME TO CHANGE MY THINKING ABOUT WHO CAN AID AND ABET IN VIOLATING THE LAW. I'M SORRY, I SHOULD BE STANDING UP. AND I WILL HAVE TO CONSIDER THAT QUITE STRONGLY, BUT YOU DON'T NEED TO DRESS ME DOWN IN THIS COURTROOM. I AM NOT A ROOKIE POLICE OFFICER. I'VE BEEN ONE FOR 24 YEARS, AND I HAVE BEEN A CHIEF OF POLICE FOR 7 YEARS.

THE COURT: I UNDERSTAND.

MR. GROLL: AND I'M GOING THROUGH WITH AS MUCH CONCERN AS THESE PEOPLE AND THEIR WIVES ARE OVER MY REPUTATION AS A POLICE

CHIEF AND MY OFFICER'S REPUTATIONS. HE'S BEEN CALLED A LIAR. I HAVE BEEN CALLED INCOMPETENT. YOU'RE CALLING ME INCOMPETENT NOW.

THE COURT: I'M NOT CALLING YOU INCOMPETENT AT ALL.

MR. GROLL: YES, YOU ARE.

THE COURT: WHAT I'M SAYING, CHIEF GROLL, IS YOUR VIEW OF THE LAW IS WRONG AND THE CRIMINAL LAW BEFORE YOU CHARGE PEOPLE WITH FELONIES, THAT PERSON HAS GOT TO EITHER DO THE CRIME THEMSELVES OR THEY HAVE GOT TO PAY ANOTHER. AND YOUR VIEW, BY MY BEING PREJUDICE TO THE JURY, AND YOU'RE ENTITLED TO YOUR OWN VIEW AND I AM CERTAINLY NOT SENSITIVE ABOUT THESE THINGS AT ALL, BUT I HAVE A DUTY TO PRESIDE OVER THIS PROCEEDING AND CHANNEL THE THINKING OF THE JURY IN THE CORRECT WAY. AND THESE CASES ARE VERY DIFFICULT AND COMPLICATED AND IT'S VERY EASY FOR JURORS TO

MISAPPREHEND THE LAW. AND IT'S MY RESPONSIBILITY TO SEE THAT THEY HAVE A CLEAR VIEW OF THE LAW.

AND THE REASON THAT I HAVE MADE THE COMMENTS THAT I HAVE IN THIS CASE ARE BECAUSE I WANT THE JURY TO BE ADVISED CORRECTLY ABOUT WHAT THE LAW IS. AND THE MOST IMPORTANT THING IN ANY CRIMINAL STATUTE IS THAT THERE BE A UNION OF ACT AND INTENT. AND WHAT YOU FORGOT ABOUT TOTALLY IN THIS CASE IS THE REQUIREMENT OF INTENT. AND THERE HAS GOT TO BE INTENT ON THE PART OF THESE PEOPLE TO BE CHARGED WITH THE FELONY.

AND THE SAME IS TRUE WITH THE COUNTY ATTORNEY. YOU DON'T CHARGE PEOPLE IN UTAH WITH FELONIES IF THEY DIDN'T PARTICIPATE KNOWINGLY IN THE COMMISSION OF THE CRIME. AND THEY CERTAINLY DON'T NEED TO DO IT THEMSELVES, BUT NEED TO KNOW WHAT SOMEBODY ELSE IS DOING, AND THAT NEEDS TO BE DONE

AT THE SOLICITATION OR ENCOURAGEMENT. AND THERE SIMPLY ISN'T A SHRED OF EVIDENCE IN THIS CASE THAT MR. ENGLAND KNEW ANYTHING ABOUT WHAT WAS HAPPENING AT THE TIME THAT THIS WAS DONE, AND THAT'S WHY I HAVE SAID WHAT I HAVE DURING THE TRIAL.

MR. GROLL: I APPRECIATE YOU LETTING ME DISCUSS THAT WITH YOU.

THE COURT: THAT'S FINE.

MR. GROLL: AND I HAVE -- I FEEL JUST AS BAD ABOUT AND JUST A BIG RESPONSIBILITY TO THE CITIZENS OF THIS CITY WHEN COMPLAINTS ARE BROUGHT TO ME AND CONCERNED ABOUT THE COMPLAINT ISSUE FROM MY OFFICE. AND I FELT AS MUCH REMORSE, PERSONALLY, FOR ME BECAUSE A $1 MILLION SUIT HAS BEEN SUED AGAINST ME BECAUSE THEY HAVE -- BECAUSE THEY HAVE BEEN CHARGED. AND I DON'T THINK IT'S ANY MORE FAIR TO BRING ME DOWN HERE AND PUT ME THROUGH THIS, THAN IT WAS FOR THEM.

THANK YOU, YOUR HONOR.

THE COURT: STAND UP AND LET ME TALK WITH YOU JUST A MINUTE MORE, CHIEF GROLL.

AS FAR AS WHAT OCCURRED BACK THERE, ANYBODY CAN MAKE A MISTAKE, BUT THE REASONS THAT I MADE THE COMMENTS I DID TO GET IN HERE, IT SEEMS TO ME WITH ALL DUE RESPECT, THAT YOU WOULD LEARN SOMETHING FROM THIS SUIT ABOUT THE CRIMINAL LAW. AND THE REASON I SAID WHAT I DID IS I HEARD YOU ON THE STAND YESTERDAY AND YOU SAID THAT YOU STILL BELIEVE THAT AN OWNER CAN BE CHARGED WITH THE FELONY BECAUSE THEY ARE AN OWNER. AND THAT IS SIMPLY WRONG.

AND IN YOUR CAPACITY AS CHIEF OF POLICE, AND IF YOU BELIEVE THAT YOU CAN CHARGE PEOPLE WITH FELONIES WHEN THEY DIDN'T INVOLVE THEMSELVES PERSONALLY IN THE INCIDENT, THAT IS WHAT CONCERNED ME. I'M NOT THE LEAST BIT CONCERNED ABOUT MR.

HENDRICKS BECAUSE I DON'T KNOW WHETHER HE MADE A MISTAKE OR DIDN'T MAKE A MISTAKE. BUT YOU APPARENTLY STILL HAVE THAT SAME VIEW, AND THAT'S WHAT I'M CONCERNED ABOUT.

WE WILL BE IN RECESS UNTIL 9:15.